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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1932

No. 5

THE NEW YORK CENTRAL SECURITIES CORPORATION,

Appellant,

against

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, and THE MICHIGAN CENTRAL RAILROAD COMPANY,

Appellees.

BRIEF ON BEHALF OF THE NEW YORK CENTRAL RAILROAD COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, AND THE MICHIGAN CENTRAL RAILROAD COMPANY, APPELLEES

CHARLES C. PAULDING,
JACOB ARONSON,
Solicitors for
The New York Central Railroad Company,
The Cleveland, Cincinnati, Chicago and
St. Louis Railway Company, and
The Michigan Central Railroad Company,
Appellees,
No. 466 Lexington Avenue,
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Appellees.

BRIEF ON BEHALF OF ABOVE NAMED RAILROAD COMPANIES, APPELLEES

Preliminary Statement

In the brief for the United States and the Interstate Commerce Commission, concurrently filed, is contained a statement of the case, which, for that reason, is not repeated here. With respect to argument, it is the purpose of this brief to avoid repetition of the Government's brief

and merely to supplement the answers there made to the appellant's contentions. The opinion of the District Court is reported in 54 Fed. (2d) 122.

POINT I

The Commission's approval and authorization of the leases were within its statutory jurisdiction.

In its first point, the appellant contends that, because the New York Central had previously acquired majority ownership of the capital stock of the lessor companies, the Commission was powerless to authorize the leases. The appellant's theory is that the statute authorizes acquisition of control by stock ownership or by lease and that, therefore, the existence of some measure of control by stock ownership negatives the power of the Commission to authorize expansion of control by lease.

One obvious purpose of the Transportation Act was to authorize, with the approval of the Commission, railroad consolidations. In recognition of the circumstance that the promulgation of a comprehensive consolidation plan might take years in accomplishment, the legislation was framed so that progress in control might be made in the interim. The only limitation prescribed in the statute with respect to acquisitions prior to the adoption of a nation-wide consolidation plan was that they should not involve "the consolidation of such carriers into a single system for ownership and operation". [Interstate Commerce Act, Section 5 (2).] Specifically, acquisitions of control under lease or by purchase of stock, short of consolidation into one

corporation for ownership and operation, are authorized in the statute. Manifestly, there are varying degrees of control short of complete consolidation "into a single system for ownership and operation". It is repugnant to the specific provision of the statute and inconsistent with its whole plan to say, as the appellant does, that in all cases where some measure of control existed at the time of the passage of the Transportation Act, regardless of the degree or efficiency of such control, the existing status became "frozen" and static pending the adoption of the nation-wide consolidation plan.

POINT II

The leases do not create a consolidation into a single system for ownership and operation.

Even if the statute merely prohibited acquisitions of control "into a single system for ownership and operation" otherwise than pursuant to the nation-wide consolidation plan, it would seem clear that neither the ownership by one railroad company of a majority of stock of another, nor the lease thereof, nor both, would be within the prohibition. Here, however, it is not necessary to rely on that ground alone, because of the fact that the statute itself spells out types of acquisition of control that are not intended to be included within the expression "a single system for ownership and operation". Ownership of stock and lease are both named in the Act as methods of acquisition of control that are not only to be deemed free of the limitation but as types of control that are specifically authorized. The obvious intention of the law to sanction any or all forms

of control approved by the Commission, short of consolidation "into a single system for ownership and operation", is emphasized by the additional language of the statute, which authorizes not only acquisitions of control by stock ownership or under lease but, as well, "in any other manner not involving the consolidation of such carriers into a single system for ownership and operation".

If further evidence of the untenable nature of the appellant's contention were needed, it is to be found in the language of Section 5 (6), of the Interstate Commerce Act, which deals with consolidations pursuant to the plan to be promulgated by the Commission. It is there provided that it shall be lawful for two or more carriers "to consolidate their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties". The nature and extent of the control which is disallowed in Section 5 (2) is thus redefined in Section 5 (6). The conclusion is clear that acquisitions of control may be authorized under Section 5 (2) so long as such acquisitions do not result in the consolidation of two or more carriers into a single system for ownership and operation, or, stated differently, into one corporation for ownership, management and operation.

POINT III

The Commission, in authorizing the acquisition of control by the leases here involved, acted within its lawfully delegated powers.

In Point III of its brief, the appellant urges that the lines of the lessor and lessee companies are parallel and

competing, and that, therefore, the Commission was without power to authorize the leases.

Aside from the fact that there is no evidence in the case to support the appellant's allegations that the lines of the lessor and lessee companies are parallel and competing, and although the record shows that the lines are primarily and substantially complementary to each other, the contention fails for the reason that Section 5 (8) of the Act specifically relieves carriers from the operation of the anti-trust laws and "of all other restraints and prohibitions by law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by any order" made under preceding provisions of the Section. The appellant endeavors to demonstrate what it conceives to be an inconsistency between the provision for preservation of competition, contained in Section 5 (4), and the provision for relief from anti-trust laws, referred to in Section 5 (8). The preservation of competition referred to in Section 5 (4) manifestly relates to competition between the limited number of systems there contemplated and not to the preservation of competition between properties which the Commission finds it to be in the public interest to allocate to a particular system. Unless the law is so construed, the provision for establishment of a limited number of railroad systems becomes obviously impracticable of accomplishment.

After thus misconstruing paragraphs (4) and (8) of Section 5, the appellant urges that, by conferring upon the Commission the power contained in Section 5 (2) to authorize acquisitions of control "in the public interest", there is an unconstitutional attempt to delegate legislative power through failure to lay down a sufficiently definite standard

for the Commission's guidance. The purposes of the Act as declared therein have been judicially recognized by this Court.* The words "public interest", as used in the statute, when read in the light of their context and in the light of the purposes to be accomplished as thus declared and judicially recognized, are as definite as circumstances permit. As stated by Mr. Justice Holmes in *Avent* v. *United States*, 266 U. S. 127, 130, regarding statutory provisions conferring upon the Commission power with reference to car service rules, "the requirement that the rule shall be reasonable and in the interest of the public and of commerce fixes the only standard that is practicable or needed".

The requirement that the Commission shall exercise its power "in the public interest" stands upon a footing closely analogous to that of Section 1 (18), which prescribes that extensions and abandonments of lines shall be authorized when required or permitted by "public convenience and necessity", which this Court has upheld.

Chesapeake & Ohio R. R. Co. v. *United States*, 283 U. S. 35;
Texas & Pacific Ry. Co. v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266;
Colorado v. *United States*, 271 U. S. 153.

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* In *New England Divisions Case*, 261 U. S. 184, 189, the Court said:

"The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. [Marginal note: Thus: to enable the carriers 'properly to meet the transportation needs of the public,' §422, p. 491; to give due consideration to 'the transportation needs of the country, * * * and the necessity * * * of enlarging [transportation] facilities,' §422, p. 488; to 'best meet the emergency and serve the public interest,' §402, p. 477; to 'best promote the service in the interest of the public and the commerce of the people,' §402, pp. 476, 477; 'that the public interest will be promoted,' §407, p. 482.]"

See also *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456; *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331; and *Colorado* v. *United States*, 271 U. S. 153.

POINT IV

The leases are within the corporate powers of the lessor and lessee companies.

In Point IV of the appellant's brief, it is argued that the leases approved and authorized by order of the Commission are *ultra vires* of the lessor and lessee companies by reason of failure to comply with the statute of Ohio that prescribes a rental basis in the case of railroad leases.

There is a two-fold answer to this contention:

1. The law of Ohio empowers railroad corporations to lease their railroads, franchises and properties, and Section 5 (8) of the Interstate Commerce Act relieves interstate carriers from all "restraints or prohibitions by law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the" preceding provisions of Section 5. In the exercise of its paramount power to regulate interstate commerce, the Congress has enacted that interstate carriers shall be relieved from the limitations and obstructions of state laws in doing anything authorized or required by the Commission pursuant to provisions of Section 5.

A simple and not improbable illustration will demonstrate the unsoundness of the appellant's contention that Section 8807 of the Ohio General Code, which authorizes leases may not be invoked free of the rental limitation prescribed in Section 8809 of that Code. Let it be assumed that in the State of Indiana (in which the Big Four and the New York Central also are incorporated) there existed a stat-

ute which provided that in the event of a railroad lease the rental may not be as much as the net earnings of the leased railroad for the preceding fiscal year. In this connection, it is not improper to observe that public interest might reasonably justify such a restriction so as to limit the fixed charges of the operating carrier. There would thus exist two irreconcilable limitations. In such a contingency, unless Section 5 (8) is accepted at its face value and relief accorded from "restraints or prohibitions by law, State or Federal", it is obvious that the purpose of Congress would be frustrated, notwithstanding its definite and specifically expressed purpose to surmount such obstacles.

This Court has held that the Federal Government, in its field of constitutional activity, may avail itself of State instrumentalities without recognition of the restrictions thereon imposed by state law (*Federal Land Bank* v. *Crosland,* 261 U. S. 374). Closely analogous is the principle applied in *United States* v. *Chicago, Milwaukee & St. Paul R. Co.,* 282 U. S. 311, 328, where the Court said:

> "It has long been settled in this Court that the rejection of an unconstitutional condition imposed by a state upon the grant of a privilege, even though the state possess the unqualified power to withhold the grant altogether, does not annul the grant. The grantee may ignore or enjoin the enforcement of the condition without thereby losing the grant."

2. Although, as just argued, it is not necessary to establish that Section 5 directly confers corporate power to lease, the fact remains that it definitely does so. By Section 5 (2) the Commission is empowered not only to approve leases, when in the public interest, but also to authorize (*i. e.,* to make lawful) the same. Clearly, the in-

clusion in the law of the power not only to "approve" but, as well, to "authorize" is of vital significance. "To approve" is to sanction the propriety of an act, but "to authorize" is to clothe with power, that is, to *enable* the performance of the act.*

Furthermore, the appellant's contention regarding the provisions of the Ohio statute would require Section 5 (2) to be treated as if amended to restrict the Commission's authority to authorization of acquisitions "under such rules and regulations and for such consideration as may be fixed by the laws of the several states [*e.g.*, Ohio] in which the carriers involved are incorporated, and on such terms and conditions as may be prescribed by the laws of such states", or in some manner of similar purport. That Congress did not intend that state laws should govern the consideration, terms and conditions is clear from the words of Section 5 (2) that acquisitions shall be approved and authorized "under such rules and regulations and for such considerations and on such terms and conditions *as shall be found by the Commission* to be just and reasonable in the premises" (Italics ours). These provisions, together with the provisions of Section 5 (8), place the unsoundness of the appellant's contention in a strong light.

In this connection, the case of *People* v. *Illinois Central R. Co.*, 324 Ill. 591 (cert. denied 275 U. S. 541), is apposite.

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* Webster's International Dictionary defines "authorize" thus: "to clothe with authority, warrant or legal power; to give a right to act; to empower", and defines "approve" to mean: "to sanction officially, to ratify, to confirm".

In *Blair* v. *Chicago*, 201 U. S. 400, 457, it is said:

> "The company must be 'authorized' by the city council before it can lay tracks or operate railways in the streets. This is more than to designate that for which authority has already been given. To authorize is to 'clothe with authority,' Webster's Dict.; 'To give legal power to,' Century Dict. It is an additional grant of right and power which the legislature requires the corporation to obtain as a condition precedent to its use and occupation of the streets."

There the Illinois authorities and certain stockholders of the Illinois Central sought to enjoin the Illinois Central from acquiring control by lease and stock ownership of another carrier, the contention being that the carrying out of the proposals, which had been authorized by the Interstate Commerce Commission, was beyond the charter power of the carriers. The Court denied the injunction, saying (pp. 608-9):

> "The exclusive jurisdiction of Congress and of its agency, the Interstate Commerce Commission, to regulate interstate commerce and the instrumentalities of such commerce, has been recognized by this court in *Marion and Eastern Railroad Co.* v. *Missouri Pacific Railroad Co.*, 318 Ill. 436. In the exercise of this regulatory power Congress may grant to a railroad corporation created by a State, franchises additional to those enjoyed under its charter. *Central Pacific Railroad Co.* v. *California*, 162 U. S. 91; *Southern Pacific Railroad Co.* v. *United States*, 183 id. 519; *California* v. *Central Pacific Railroad Co.*, 127 id. 1.
>
> "The record shows that the Southern Illinois and Kentucky Railroad Company will be an interstate carrier. Upon the application of the appellees, which was resisted by the appellants, the Interstate Commerce Commission found, among other things, that the public convenience and necessity required the construction of the cut-off between Edgewood, Illinois, and Fulton, Kentucky, and the acquisition and operation by the Illinois Central Railroad Company of the railroad to be built by the Southern Illinois and Kentucky Railroad Company; and the commission by its order granted the requisite permission and authority for these purposes. *The appellees, by the provisions of the Interstate Commerce act, have the right to do these things without seeking any further authority.* If, as the result of the instant suit,

the construction of the cut-off should be enjoined, then a conflict of jurisdiction between the commission and the State court would necessarily arise, for what was affirmed by one would be denied by the other. In such a situation the power to determine whether State action will obstruct interstate commerce inheres in the United States as an incident of its power to regulate such commerce. *State of Colorado* v. *United States,* No. 195, decided by the Supreme Court of the United States on May 3, 1926; *Alabama and Vicksburg Railway Co.* v. *Jackson and Eastern Railway Co., supra.*" (Italics ours.)

POINT V

The appellant's contention that a lease of the Michigan Central Railroad requires approval of seventy-five per cent of the holders of an outstanding bond issue is not sustained by the text of the underlying indenture, may not be urged by the appellant because of lack of interest, and, in any event, is not cognizable in this suit.

The debenture bonds issued under the trust indenture in question (I. C. C. Docket 5690, Exhibit 47) were secured by the deposit of shares of capital stock of the Michigan Central, and the prohibition in Section 5 of Article III of the trust indenture from which the appellant on page 49 of its brief makes an incomplete quotation (Finance Docket No. 5690, Exhibit 47, pp. 22-24), was against a consolidation, merger or sale whereby title to the Michigan Central property represented by the capital stock should be transferred to the New York Central or whereby the property of any other railroad corporation should be acquired by the Michigan Central by consolidation, merger or purchase,

except with the approval of the required percentage of bondholders. A lease was neither within the prohibition of the Section nor within the intent of the prohibition. The word "lease" is to be found only in the last paragraph of Article III wherein provision is made for the execution and delivery of a second mortgage. Such mortgage was executed and delivered some time prior to the making of the lease.

But it is not necessary in this case to undertake an analysis of the provisions of the indenture. Under well settled principles, the appellant, which does not claim that it owns any of the bonds in question, has no standing to assert that the rights of bondholders are being disregarded. It is sufficient to point out that neither the trustee of the indenture, nor any holder of such bonds, is here asserting a violation of the terms of said indenture.

Furthermore, since the indenture is an agreement of the New York Central (the Michigan Central not being a party thereto) it is clear that the appellant's alleged interest is exclusively of a derivative character predicated upon its ownership of stock in the New York Central. Such a claim may not properly be asserted in a suit to annul an order of the Commission under the Urgent Deficiencies Act (*Pittsburgh & W. Va. Ry. Co.* v. *United States,* 281 U. S. 479).

POINT VI

(a) The proofs adduced before the Commission abundantly establish the reasonableness of the dividend rentals prescribed in the leases; (b) in any event, no question with respect thereto is here presented, since the appellant has neither pleaded nor proved that the order approving the terms of the leases was unsupported by substantial evidence.

(a) In view of the analyses of the voluminous evidence before the Commission in support of the reasonableness of the rental provisions under the leases, contained in the Commission's report (Transcript of Record, pp. 41-47, 74-82), in the opinion of the Court below (Transcript of Record, pp. 192-195) and in the brief of the Government (pp. 37-43), it would constitute a work of supererogation here to re-abstract and re-analyze that evidence. That the evidence was of a most comprehensive nature is indicated by a recital of the manifold aspects of the question that were submitted to and considered by the Commission. There were received in evidence before the Commission income accounts of the lessor companies for a considerable number of years (Finance Docket 5690, Exhibit 35), tables containing the vital statistics of the lessor companies for all years going back as far as the year 1909 (*id.*, Exhibits 36, 37, 38), comparisons of earnings with average market prices of a number of the principal railroads of the country (*id.*, pp. 314-324), statements showing the amount and disposition of net earnings as well as amounts of outstanding stock and dividend payments of ten principal roads in the United States as compared with the Michigan Central and Big Four (*id.*, pp. 496, 497), and a detailed consideration by

qualified witnesses of all elements germane to the fixing of a long-term rental (*id.*, p. 312 *et seq.*, 459 *et seq.*).

The appellant in its brief urges as an indication of the inadequacy of the rentals and of a breach of duty toward minority stockholders the circumstance that no effort was made by the respective lessors' directors to ascertain whether more favorable terms than those proposed by the New York Central might not be obtained from others. For over forty years the Big Four, Michigan Central and New York Central had been operated as a part of the same system in the public interest. Under these circumstances, any such inquiry would have been a mere gesture. The idleness of such an inquiry the appellant itself made clear before the Commission. In an effort to emphasize this point, the following question was put to Mr. Clarence H. Venner, President of the appellant corporation, by his Counsel:

> "Do you know of any one who, if afforded opportunity, would take a lease on the terms of this proposed lease of the Michigan Central but at a higher rental?"

The reply was:

> "Yes; a much higher rental" (p. 661).

Questioning by the Director of the Bureau of Finance of the Commission, who was presiding at the hearing, elicited the fact that the "some one" was Mr. Venner and his "associates" (p. 666), whom he declined to name (p. 669) and whom he had not even consulted (p. 670).

It is noteworthy that Mr. Commissioner Eastman, the only Commissioner voicing any criticism of the rentals, was of the opinion that they were too high (Transcript of Record, p. 86).

In view of the preponderance of evidence upon the basis of which the Commission held that the specified rentals are just and reasonable, it would not seem necessary to consider the appellant's contentions respecting the trust relationship as between majority and minority stockholders. The yard-stick prescribed by law with respect to the terms and conditions of acquisitions of control is that they shall be such as "shall be found by the Commission to be just and reasonable in the premises". All persons, including stockholders, entering into contractual or other relationships with carriers engaged in interstate commerce do so subject to the power of Congress to modify those relationships by the enactment of laws pursuant to the commerce clause of the Constitution.

Louisville & Nashville R. Co. v. *Mottley,* 219 U. S. 467;
Philadelphia, etc., R. Co. v. *Schubert,* 224 U. S. 603, 613;
United States v. *Southern Pacific Co.,* 259 U. S. 214, 234;
Colorado v. *United States,* 271 U. S. 153, 165.

In connection with the question of the fairness of the rentals fixed by the terms of the leases, it is also appropriate to consider the alternative right accorded stockholders to sell their stock to the lessee at prices to be determined by arbitration, with the understanding that, in such valuation, effect of the leases is to be considered or disregarded at the option of the stockholder. That provision in itself indicates a scrupulous regard for the interests of minority stockholders of the lessor companies.

Reduced to its essential features, the situation is that the leases accorded the appellant the right to a return on

its shares of stock, guaranteed for the terms of the leases and fixed at sums found to be just and reasonable by the administrative tribunal empowered by law to determine the same; and if not content with this, in the alternative, the right to compel the lessee to purchase its stock at a price to be fixed by arbitrators chosen in a manner universally conceded to be fair and proper. These provisions meet every rational test of fairness.

(b) The appellant's argument with respect to alleged inadequacy of the rentals is properly one which may be addressed only to the fact-finding tribunal authorized by law to determine that question. The appellant intervened in the proceedings before the Commission and there urged precisely the contentions that are here urged. This position of the appellant altogether ignores the function of judicial review of the Commission's orders, when within the scope of its jurisdiction, as repeatedly announced by this Court.

Western Paper Makers' Chemical Co. v. *United States,* 271 U. S. 268, and cases there cited;

Florida East Coast Line v. *United States,* 234 U. S. 167;

Interstate Commerce Commission v. *Union Pacific R. R. Co.,* 222 U. S. 541;

Manufacturers Ry. Co. v. *United States,* 246 U. S. 457;

Chicago, Rock Island & Pacific Ry. v. *United States,* 274 U. S. 29;

Virginian Ry. Co. v. *United States,* 272 U. S. 658.

POINT VII

The condition in the Commission's order relating to the acquisition of connecting short lines, having been accepted by the New York Central, may not be challenged in this suit by the appellant.

The only concern of the appellant in this condition of the order is in its capacity as a holder of sixty-six shares of the capital stock of the New York Central. Its interest is, therefore, exclusively derivative and as shown in the Government's brief (p. 33 *et seq.*) gives the appellant no standing in this suit to challenge the action of his corporation in accepting the condition so imposed. *A fortiori,* the appellant may not challenge in this suit the validity of the Commission's order entered upon the acceptance by the Central of the condition so imposed. (*Pittsburgh & West Virginia Railway Co.* v. *United States,* 281 U. S. 479.)

POINT VIII

The assumption by the New York Central of obligation with respect to lessor company securities was within the Commission's power to approve under Section 20a of the Interstate Commerce Act.

At the threshold it should be noted that the appellant has no standing to challenge the Commission's order approving the New York Central's assumption of obligation with respect to securities of the lessors because, here again, the appellant's concern is solely derivative. (*Pittsburgh & West Virginia Ry.* v. *United States,* 281 U. S. 479.)

Viewing the merits of the appellant's contention, that the Commission was powerless to approve the assumption of obligation by the New York Central, for the reason that such assumption is not for a lawful object within its corporate purposes, it is evident that this is corollary to its contention that the leases are *ultra vires*. Since it has been demonstrated above that the leases are not *ultra vires*, the appellant's contention in regard to the assumption of obligation and liability must fail upon that ground alone.

But the contention must fail for another reason also, namely, that the Commission's jurisdiction in proceedings under Section 20a is not measured by state law, but is exclusive and plenary under Section 20a (7).

The appellant contends that the requirements of the Section that the Commission find that the proposed issue or assumption is for some "lawful object" within the carrier's "corporate purposes" has reference to state law and the carrier's corporate powers thereunder. It is at once evident that such a construction of the language would destroy the recognized purposes of the Section. Under such an interpretation the control of the issue of securities by carriers and the assumption of obligation or liability in respect thereof would remain in control of, and carriers in these matters would remain subject to, the local and conflicting policies of the various states. Thus, the "exclusive jurisdiction conferred upon the Commission by Section 20a over the issuance of securities" (*Colorado* v. *United States*, 271 U. S. 531) would be only such jurisdiction as the Interstate Commerce Commission could exercise pursuant to the authority of and not inconsistent with provisions of varying state laws. That Congress could have intended this result is unthinkable.

Reference to the legislative history of the provisions is appropriate (*Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443) to demonstrate the unsoundness of the appellant's contention. The relevant history of Section 20a (2) is summarized in the opinion below (Transcript of Record, pp. 198, 199) and in the brief of the Government (pp. 27-28).

Conclusion

It is respectfully submitted that the decree below should be affirmed.

Dated, October 1, 1932.

CHARLES C. PAULDING,
JACOB ARONSON,
Solicitors for the Railroad Companies, Appellees.